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## THE JUDICIAL REFORMS OF THE REIGN OF HENRY II.\*

**I**NASMUCH as this paper is to deal with the judicial reforms of the reign of Henry II, and more particularly with the extension of the jurisdiction of the king's court during that period, we must at the outset, for the purpose of comparison, make a brief study of the courts, their jurisdiction, and their methods of procedure at the close of Saxon and the beginning of Norman times. Mention should first be made of the courts of the hundred and of the shire, for it was in these public local courts, particularly in the former, that in early times justice was for the most part administered. The assembly of the township, the lowest administrative area, was concerned chiefly with the regulation of the common-field husbandry and had no judicial functions. The courts of the hundred and of the shire combined judicial with administrative work, as was the custom in those days. These courts were primitive Teutonic assemblies in which the freemen of the hundred or of the shire were the doomsmen by whom the judgments of the court were rendered. From the early Saxon codes it may be inferred that when they were drawn up the staple judicial proceedings were manslaughter, wounding and cattle stealing.

Side by side with the courts just mentioned we must place the feudal courts, which, like the former, were local and, unlike them, private. Before the Norman Conquest, feudalism, at least on its economic side, had come into existence in England and the country was covered with what in all essential points were manors, which had largely taken the place of free townships. Causes long at work had been depriving the ordinary freemen of economic independence

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\* The writings of the late F. W. Maitland, particularly Pollock and Maitland's *History of the English Law*, are the most authoritative sources of information in regard to the subject dealt with in this paper.

and reducing them to a condition of villeinage. The disorders of the Danish wars had compelled men of humble condition to seek the protection of the powerful. As a police regulation the Anglo-Saxon state required every man to have a lord who should be responsible for him. At the same time private jurisdiction, another element of the manor, was gaining ground. The lord of the manor seems to have had the right to exercise civil jurisdiction over his tenants even without express grant. In many cases the king granted criminal jurisdiction. Grants of jurisdiction on the part of the king were frequent both before and after the Norman Conquest. The manorial court as we know it in Norman times is either the court baron, the customary court, or the court leet, which indeed are rather different sides of the same court than distinct courts. The court that the lord held for his free tenants and to which they owed suit was the court baron. The court for his villeins, presided over by his steward, was the customary court. If the lord of the manor had criminal jurisdiction, the court from this point of view came to be known as the court leet. It was to the court baron, not to the public local courts, that jurisdiction over cases concerning the ownership of land belonged.

In addition to the two kinds of local courts, the public and the feudal, was the jurisdiction wielded by the king in the *Curia Regis*, as the council was called over which the king presided and by the aid of which he carried on the government. Akin to the jurisdiction of mesne lords over their tenants was the judicial authority wielded by the king over his barons. This jurisdiction seems to have belonged to the king as supreme landowner. But apart from this feudal jurisdiction the king had a more general jurisdiction over certain classes of cases known together as pleas of the crown. We have two lists of pleas of the crown, one from the reign of Canute and the other from the reign of Henry I. A comparison between them shows a considerable enlargement during the intervening period. Some of the pleas aim at giving a special protection to the king or his ministers or the agencies he employs. Among pleas of this kind are, according to the second list: breach of the king's peace; *dane-geld*; contempt of his writs or precepts; death or injury done to his servants; treason and breach of fealty; every contempt or evil word against him; counterfeiting his money. The list also includes a number of grave crimes which can not be regarded as committed against the king in the same narrow sense in which contempt of his writs and counterfeiting his money can be regarded as offenses against him. Among these crimes are murder, premeditated assault, robbery, theft punishable with death, rape, and arson. It is signifi-

cant that these crimes have already come to be regarded as committed against the king. The king's jurisdiction, though growing, is still, however, exceptional. It is to advance so rapidly during the reign of Henry II that by the beginning of the thirteenth century all crimes will be subject to the jurisdiction of the king's court, only some petty offences remaining within the competence of the local courts.

In additon to what we would now call criminal actions the pleas of the crown include actions for protecting the king's fiscal rights, such as treasure-trove, shipwreck, and goods cast up by the sea. No sharp distinction was drawn in those days between civil and criminal cases. Indeed such a line could scarcely be drawn as long as the primitive Teutonic system of compensation for injuries according to a graduated scale continued in vogue. Alfred the Great regarded this system as due to the influence of the gospel in softening the stern penalties of the Mosaic code.

It follows from what has already been said that there were at the time with which we are dealing three jurisdictions carrying on the administration of justice: the public local courts of the hundred and of the shire, the feudal courts, and the king's court or the *Curia Regis*. We have next to inquire what were the methods of proof employed by these courts; for the introduction of better methods of discovering facts was to be one of the chief causes of the growth of the business of the king's judges. Where our courts make use of the jury the courts of Saxon and of Norman times employed compurgation and the ordeal. The compurgators were oaths-helpers who swore, not that the accused was innocent, but that his oath was to be believed. A certain number of such compurgators was required and the value of their oath depended upon the social class to which they belonged. The ordeal was used for the most part in grave crimes and was an appeal to the supernatural for aid in deciding questions too difficult for man's wisdom. The four ordeals known to Anglo-Saxon law were the ordeal of hot iron, the ordeal of hot water, the ordeal of cold water, and the ordeal of the morsel. In the first of these ordeals the accused was required to carry hot iron in his hand for nine steps. If at the end of three days the hand had festered he was guilty, if not innocent. If the ordeal of hot water was used the accused was required to plunge his hand into hot water as far as the wrist or even to the cubit, the former if the ordeal was simple, the latter if threefold. If the accused was thrown into cold water he was adjudged innocent if he sank, guilty if he floated. If the ordeal of the morsel was used a piece of bread or cheese weighing an ounce was given to the accused after having been adjured to stick in

his throat if he was guilty. To these ordeals the Normans added the judicial combat or trial by battle, which became the ordinary way of deciding questions involving the ownership of land.

These primitive methods of discovering facts were to be supplanted by the jury of the neighbors, which was to appear during the reign of Henry II as the accusing jury and as the trial jury in civil cases, and later as the petty jury or the trial jury in criminal cases. A sworn jury of neighbors is such a simple and obvious method of discovering facts that at first sight it seems scarcely necessary to inquire as to its history. When, however, we remember that compurgation and the ordeals were for centuries made use of by the English courts we begin to see that what seems obvious has not necessarily existed everywhere and from all time. The method of ascertaining facts by means of an inquest or inquisition was frequently employed by the Frankish kings, who had inherited the procedural prerogatives of the Roman emperors. From the Frankish court this method passed to the court of the Norman dukes, who not only used it to discover and protect their own rights, but also in special cases granted the privilege of using it to their subjects. The Normans brought it to England where it was made use of by the commissioners sent out by William the Conqueror to gather the information in regard to the taxable property of England embodied in Domesday Book.

So far we have made a brief study of the courts, their jurisdiction, and their procedure. We have also glanced at the early history of the jury, destined as it was to supplant primitive methods of getting at facts. We are now prepared to inquire what were the causes of the rapid growth of the jurisdiction of the king's court both in civil and in criminal cases during the second half of the twelfth century. It will be remembered that by the beginning of the thirteenth century all persons accused of crime were tried before the king's judges. It should be borne in mind in entering on this study that the struggle between the king's judges and the feudal courts was largely a question of the profits of jurisdiction. The king no doubt desired to extend his authority and to furnish a good article of justice; but the more numerous were his suitors the greater was his revenue. In like manner the mesne lords were unwilling to see their revenues diminished by the encroachment of the king's judges.

The growth of the jurisdiction of the king's judges in criminal cases is largely due to the wide interpretation given by the judges to two pleas of the crown, breach of the king's peace and felony. This at least is the natural explanation to put on facts that are beyond dispute. Formerly the king's peace was limited to certain

places, times, and persons. Under its protection were the king's servants, the time of his coronation and of the three great festivals of Christmas, Easter and Pentecost, and the four great highways, the ancient Roman roads running through the country. By the end of the twelfth century, however, these limits have disappeared and the king's peace has, in the expressive language of Maitland, devoured all other peaces. Any breach of the peace is now a breach of the peace of our lord the king. So it is with felony, which at the beginning of our period meant a breach of the feudal tie, particularly treason, but at the close of the period covers all serious crimes. Murderers, robbers and thieves are now felons, liable to death and escheat. The breakdown of the old system of compensation for injuries may have been one of the causes of this change. The prospect of escheats may have reconciled the feudal lords to curtailment of jurisdiction. An extract from the pleadings of the time, quoted by Maitland, will serve to show the broad sense in which a person bringing a criminal charge was allowed to use the terms breach of the king's peace and felony. "Whereas, the said Allan was in the peace of God and of our lord the king, there came the said William feloniously as a felon and in premeditated assault" inflicted a wound on Allan or robbed him of his chattels. It was in vain that the defendant urged that the crime charged had no such comprehensive meaning as was attached to it in the pleadings.

A further change in the administration of criminal justice was the establishment by the Assize of Clarendon, of 1166, supplemented by the Assize of Northampton of 1176, of the jury of presentment or the accusing jury, known in its modern form as the grand jury. When the king's justices on circuit visit the shire twelve men of each hundred are to appear before them and present persons suspected of crime. The persons accused were to go to the ordeal. Even if successful they were to abjure the country. Criminal charges had hitherto been made by the injured person or his relatives. The accusation was known as the appeal and the accuser as the appellor. Indictment by an accusing jury, which thus took its place side by side with the appeal as an alternative method of accusation, made accusation a public function. Trial of indicted persons by a petty jury was to come somewhat later. Even after it did come into vogue it was long held that an accused person could not be brought before a trial jury unless he put himself on the country. Torture, however, was employed to extort consent. "So late as 1658," says Maitland, "a man was pressed to death, so late as 1726 a man was pressed into pleading, not until 1772 was the *peine forte et dure* abolished." Men preferred torture to conviction because conviction meant

forfeiture of their lands and chattels and the ruin of their families. Only indicted persons could be forced before a jury. In the year 1818 an appellee demanded trial by battle while the appellor refused to fight. Appeals were abolished by statute in the following year.

The growth of the jurisdiction of the king's judges in civil cases is largely explained by the remedies offered to suitors in the king's court for protecting the right of possession. At a time when crimes of violence, such as the unauthorized seizure of land, were more common than in a more settled state of society, the king by a series of ordinances, known as assizes, enabled persons forcibly dispossessed to avail themselves of what we may already call a jury to recover possession. The term assize means either the ordinance or the remedy, particularly the jury empanelled under the ordinance. Under the assize of novel disseisin, enacted probably in 1166, a person forcibly dispossessed of land may obtain a writ authorizing the empanelling a jury, which in the presence of the king's judges shall pass on the question whether the suitor has been forcibly dispossessed. The question of ownership or best right may not be raised in such an action. If the jury finds that A has been forcibly dispossessed by B, A recovers possession. The only course open to B is to do what he ought to have done in the first place,—bring an action in the feudal courts to test the title. He may not take the law into his own hands and disturb existing possession even under the claim of ownership. Possession establishes a presumption that can be overcome only by an action at law. In like manner the assize *mort d'ancestor* enables the heir to gain possession of his inheritance, allowing no other question to be raised save the question whether he is the rightful heir of the man who died in possession. The question whether the man last in possession, in other words the ancestor, has a good title can not be raised in this action, the sole object of which is to protect possession. The hindering of the heir from taking possession of his estate is treated as dispossession. The same method is applied by the assize of *darein presentment* to rights of advowson. In case of a vacancy in a benefice and rival claimants to the right to present to the living, a claimant may settle the question provisionally by obtaining a writ directing the empanelling of a jury, to which shall be submitted the question whether he made the presentation at the last vacancy. An expeditious remedy was necessary in such a case, for otherwise the pope would make the appointment.

From these possessory actions must be distinguished the action provided by the grand assize for trying the title to freehold. This enabled the tenant whose title to the land was attacked to obtain a

writ and have the action transferred from the feudal court to the king's court and there decided by a jury of the neighborhood. Even this action, though it dealt with the question of ownership or best right, was akin to the possessory actions, for only the tenant could avail himself of the new remedy offered by the king's judges. If he failed to do so the action took its course in the feudal court and was decided by wager of battle. This proprietary action was more formal and formidable than the possessory actions, and the jury was made up of twelve knights of the shire chosen by four knights named by the sheriff. The object of this arrangement was to secure greater impartiality than could be obtained if the members of the jury were chosen directly by the sheriff.

The remedies provided by the ordinances or assizes named above were statutory remedies in the sense that the particular question to be submitted to the jury was fixed by the statute. Under the assize of novel disseisin, for example, the jury passed solely on the question of recent forcible dispossession. Side by side, however, with the assizes, as the juries authorized by the assizes came to be called, "there grew up," says Maitland, "the practice of sending to a body of recognitors questions of fact that arose out of the pleadings." The jury in this case was not summoned by the writ that initiated the proceedings, but was called only when questions of fact arose and when the parties agreed to be bound by its verdict. For a jury, but not for an assize, there must be accord of the parties, but the judges know how to convince a reluctant suitor. Aside from these differences we may regard the bodies of sworn recognitors provided for in the assizes named as the beginning of trial by jury in civil cases. We may, however, prefer to say, with Maitland, that while the assizes are doing their work the jury comes in by a side door. How close was the resemblance between a jury and an assize may be inferred from the fact that in cases pending before an assize, the assize sometimes served as a jury and passed upon other questions in addition to the question formulated in the ordinance under which the assize was summoned. Until a later date the jury gave its verdict without hearing witnesses.

The writ *praecipe*, so called after its initial word, was issued with great frequency during this reign, and is of particular interest as showing the finesse and chicane employed in extending the judicial authority of the king's justices and also the resistance of the baronage to what in the long run was to prove most advantageous to the realm. Among the pleas of the crown, of which two, breach of the king's peace and treason or felony, have already been described, was contempt of the king's writs or precepts. With great ingenuity a

writ was devised in which the sheriff was instructed to command B (Praeipie B), to make over to A the land, chattels or money that he claimed or, if he failed to do so, to appear before the king's judges and explain his disregard of the king's writ. The curious thing about this procedure is that the offence is committed by B after the writ summoning him to justify himself comes into his hands. The writ was evidently a device of the lawyers for extending the king's jurisdiction. B was expected to deny that he detained lands or chattels belonging to A or owed him money, and then to choose between wager of battle and the grand assize, the defendant alone having the right to put himself upon the grand assize. How serious was the attack upon feudal jurisdiction becomes clear when we remember that with the aid of this writ cases involving the ownership of land might be brought in the king's court. Moreover such facility of interpretation made further encroachments probable.

In view of these facts it need not surprise us to find the king compelled in Magna Charta to promise that "The writ which is called praecipe shall not for the future be issued to anyone concerning any tenement whereby a freeman may lose his court." This checks the encroachment of the king's court upon the feudal courts. But the check was only for a time. Somewhat later a writ of entry took the place of the writ praecipe and a possessory action, modified for the purpose, accomplished effectively the results aimed at by the earlier writ, but not without damage to the form of English law.

Certain clauses of the Charter, among them the one just quoted and another shortly to be mentioned, have been relied upon to prove the reactionary character of the document. It was inevitable that the Charter should safeguard feudal rights, for while modern law was already coming, it had not yet come. All that can reasonably be expected is that the baronage shall be moderate in their demands and not attempt to cripple the royal authority. Indeed the importance of the Charter lies not so much in its individual provisions as in its underlying principle that the king is not above the law.

The reign of Henry II witnessed not only a remarkable increase in the business of the king's court, but also important changes in judicial organization. The latter, while due no doubt mainly to increased business, were in harmony with certain changes that were taking place in the government as a whole. In early times, when the tasks of government are simple, the same organ will perform different kinds of work. Indeed a long time will elapse before it begins to be seen that the functions performed by the organ differ one from another. At length experience will show the inconvenience of using the same machinery for such different kinds of work. Then

will occur what we may call adaptation of the organ to its functions. When this adaptation has gone far enough new organs will be evolved. We may express this change by saying that differentiation of function must precede differentiation of machinery. We must remember, however, that men adapt machinery to needs almost unconsciously and before they can formulate a reason for it.

An interesting illustration of this process may be taken from the history of the English parliament. The Witenagemot of Saxon times survived the Norman Conquest as the king's council with some change in composition, and later it came to be known as the *magnum concilium* or great council. Side by side with the great council there was a small council, which was also known as the *Curia Regis* and to which indeed that name came to be specifically applied. This smaller council was the body by the advice of which the king carried on the current administration and it came to be known at a later time as the *privatum concilium* or privy council. We know the councils a little later as separate bodies and hence we naturally think of them as distinct even under the early Norman kings. Such, however, does not seem to have been the opinion of contemporaries. They regarded the larger and the smaller body alike as the one *Curia Regis*, with a large attendance, which might include all tenants-in-chief, when it dealt with matters of legislation or other questions of great moment, but with a small attendance when it concerned itself with the current administration. If this view be correct the small council separated itself from the larger for the performance of a certain class of functions.

An even better illustration may be taken from the history of the smaller council, the activity of which covered the entire administration, including the financial administration. Experience early showed that the administration of the finances required methods and machinery different from those employed in the other branches of the administration. Accordingly the *Curia* gave itself an organization particularly adapted to this side of its work. It was the *Curia* that carried on the financial administration, but the *Curia* organized as the Exchequer. The top of the table at which the barons of the Exchequer sat was divided into squares, seven squares the long way of the table and two the short way. Each square stood for a denomination of money, and counters corresponding to the denomination were placed in the squares. The counters in the upper row of squares showed the sum for which the sheriff was responsible, while the counters of the lower row showed the payments already made. Those who manipulated the counters had the appearance of playing chess: hence the name of Exchequer. At the Easter session of the

court the sheriff received a stick showing by means of notches the amount already paid. This stick, which formed the sheriff's receipt, was in fact half of a stick split down the center so that the notches would show equally on both halves. The other half was kept by the Exchequer. At the Michaelmas session the accounts of the year were closed, the sheriff presenting his notched stick and completing his payments. It was the burning of these Exchequer sticks that caused the destruction by fire of the parliament building that was replaced by the present Houses of Parliament. When we consider this specialized administration we can understand how the Exchequer came to separate itself from the Curia and to become a distinct department with its own rolls and seal.

In a manner similar to that just described a central court, made up of sworn judges, came to be formed during the reign of Henry II. According to Maitland this court, which was later on to divide into the Court of King's Bench and the Court of Common Pleas, was already getting the name of the "bench." The Court of Exchequer, the third of the three great courts, which tried cases arising out of the financial relations of the government with its subjects, differentiated itself from the Exchequer. Even after the formation of a central court the king occasionally presided over it, as he presided regularly over the Curia Regis, and it sometimes followed his person, as was regularly the case with the latter body. But at length it came to be stationary at Westminster and to hold its sessions without the king. The central court would more and more come to be made up of judges trained in the law, and such men would not be found in the ranks of the high nobility. The dislike with which the barons regarded this body of trained judges finds expression in the famous clause of Magna Charta,—“No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.” This clause was long regarded as securing to all freemen trial by jury. The mistake arose from a misunderstanding of the term peers. The peers of barons were the baronage. With John's disregard of personal liberty, of which they had abundant reason to complain, they classed Henry's central court. For them trial by a council of barons was at the same time trial by their peers and the law of the land. All that the barons gained in the long run was the trial before the House of Lords of peers charged with treason or felony.

Now that the king's court had so largely increased its jurisdiction both in criminal and in civil cases it was necessary that it should be

brought to the door of the people. Already during the reign of Henry I we occasionally see itinerant justices going on circuit from shire to shire to look after the fiscal rights of the king and to hear pleas of the crown. The justices on circuit now become a permanent part of the judicial organization. The central government was thus brought into relation with local institutions. It must be remembered, however, that the court presided over by the itinerant justices was not the court of the shire but the king's court. It differed in organization, jurisdiction, and procedure from the court of the shire, and its profits flowed into the royal treasury. Indeed the loss of importance on the part of the county court is largely explained by the concentration of justice in the king's court.

Seldom, if ever, has there been a period more fertile in judicial reform than the latter half of the twelfth century, a period which witnessed the decay of the public local and of the feudal courts, the growth at their expense of the royal jurisdiction, the establishment of a central court represented periodically in the shires by justices on circuit, and the introduction of the accusing jury and of the trial jury in civil cases. In the countries of continental Europe the conflict between the laws and customs of different localities favored the reception of Roman law. Such might have been the case in England had not the concentration of justice in the king's court, the great judicial achievement of the reign of Henry II, prepared the way for the unity of English law. As a result of the development here described, English law became the common law.

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